BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NOS. 2017-207-E, 2017-305-E, & 2017-370-E

IN RE:

Friends of the Earth and Sierra Club,

Complainants/Petitioners,

v.

South Carolina Electric & Gas Company,

Defendant/Respondent.

IN RE:

Request of the Office of Regulatory Staff for Rate Relief to South Carolina Electric & Gas Company's Rates Pursuant to S.C. Code Ann. § 58-27-920.

IN RE:

Joint Application and Petition of South Carolina Electric & Gas Company and Dominion Energy, Inc., for review and approval of a proposed business combination between SCANA Corporation and Dominion Energy, Inc., as may be required, and for a prudency determination regarding the abandonment of the V.C. Summer Units 2 & 3 Project and associated customer benefits and cost recovery plan.

JOINT APPLICANTS' MOTION FOR DECLARATORY RULINGS AND MOTION *IN LIMINE*

INTRODUCTION

Over the past ten years, and in 14 separate dockets,[1] this Commission has reviewed, approved, and in some cases, modified the construction decisions, commercial arrangements, cost and construction schedules, and actual expenditures for the two nuclear units that South Carolina Electric & Gas Company ("SCE&G") sought to build in Jenkinsville, South Carolina (the "NND Project," or the "Project"). The scope of this review has been without equal in South Carolina regulatory practice, and with few equals nationally. It was conducted in strict compliance with the terms of the Base Load Review Act (the "BLRA"), which was adopted for the specific purpose of making such a review possible.

During those ten years, the South Carolina Office of Regulatory Staff ("ORS") and other interested parties have conducted discovery, performed in-depth audits and other reviews, raised issues, and reported findings to the Commission. They have presented and cross-examined witnesses, and otherwise participated as parties of record with full rights in those 14 proceedings. Weeks of hearings have been held, thousands of pages of sworn testimony have been considered, tens of thousands of pages of source documents have been provided to ORS and intervenors, and hundreds of pages of orders have been written.

In almost every case, the orders issued by this Commission during this ten-year process were based on settlement agreements, revised rates reports, or sworn testimony submitted to it by ORS as the entity charged with protecting the public interest in these matters. In reliance on those orders and proceedings, SCE&G has raised and invested approximately $5 billion in this NND Project.

[1] *See* Docket Nos. 2008-196-E, 2009-211-E, 2009-293-E, 2010-157-E, 2010-376-E, 2011-207-E, 2012-186-E, 2012-203-E, 2013-150-E, 2014-187-E, 2015-103-E, 2015-160-E, 2016-223-E, and 2016-224-E.

But now – because the Project has been abandoned following the bankruptcy of its contractor, Westinghouse Electric Company, LLC ("Westinghouse") – ORS is leading the charge to rewrite history, ignore all that has come before, and retroactively reverse a decade of carefully considered orders that do not now suit the state's political interests. This is not a result that the law allows.

No principle is more fundamental to our system of justice, and to our understanding of the rights of private parties, than the principle that final juridical decisions, once made, and having been relied upon by others, must be respected. Such decisions cannot be reopened and reversed simply because it would be politically popular or economically advantageous to certain parties to do so. To take the approach to the law proposed here by ORS and other parties is entirely antithetical to our system of justice and private rights.

For this reason, Joint Applicants SCE&G and Dominion Energy, Inc. ("Dominion Energy") (collectively, "Joint Applicants") now move the Commission, pursuant to S.C. Code of Regs. R. 103-829, for an order affirming the legal standards that will apply to the hearing in these Consolidated Dockets (Docket Nos. 2017-207-E, 2017-305-E, and 2017-370-E). Those standards are well established in decisions by the South Carolina Supreme Court, in the applicable statutes, and in multiple orders of the Commission. A ruling affirming those standards is required to define the scope of testimony, evidence, and argument that will be germane to the issues to be presented at the upcoming hearing in the Consolidated Dockets.

More specifically, Joint Applicants seek a ruling from the Commission:

(1) Affirming the findings, rulings, and determinations made by the Commission in the 14 prior proceedings concerning the NND Project, including its determination that SCE&G is entitled to recover the costs incurred on the NND Project through June 30, 2016, and barring the

introduction of any testimony, evidence, or argument challenging those prior decisions;

(2) Declaring that the South Carolina Supreme Court's decision in *S. Carolina Energy Users Committee v. S. Carolina Pub. Serv. Comm'n*, 388 S.C. 486, 697 S.E.2d 587 (S.C. 2010), precluded SCE&G from including in its estimate of future construction costs contingency amounts over and above contractually-established or otherwise hard-budgeted, pre-contingency costs and precludes parties to the Consolidated Dockets from introducing testimony, evidence, or argument to the contrary;

(3) Finding that the South Carolina Supreme Court's decision in *S. Carolina Energy Users Committee v. S. Carolina Elec. & Gas*, 410 S.C. 348, 764 S.E.2d 913 (S.C. 2014), precludes parties to the Consolidated Dockets from introducing testimony, evidence, or argument placing a burden on SCE&G to recertify the prudency of the NND Project after its initial approval; and

(4) Holding that the prudency standards set forth in Act No. 258 of 2018 ("Act 258") cannot be applied retroactively and barring the introduction of any testimony, evidence, or argument purporting to apply those standards to the NND Project.

Joint Applicants further request that the Commission strike all testimony and documents regarding any of these topics. ***Exhibit 1*** to this Motion identifies the testimony which should be stricken from the record of the Consolidated Dockets. Pending an order to that effect, Joint Applicants request that the Commission accept this filing as a standing motion to strike any and all such testimony.

THE BLRA

In 2006, the General Assembly of the State of South Carolina adopted a new law to enable utilities to consider building nuclear generating units to serve the needs of South Carolina customers. That legislation, the BLRA, allowed utilities to recover:

1. The financing costs of nuclear units while they were being constructed;

2. The cost of owning and operating the units once they were completed; and

3. The capital invested in units should they be abandoned before completion.

See S.C. Code Ann. §§ 58-33-210, *et seq*. Financing costs were made recoverable under the revised rates sections of the BLRA, S.C. Code Ann. § 58-33-280; post-construction costs were made recoverable under the in-service expenses sections of the BLRA, S.C. Code Ann. § 58-33-280(B); and capital investment was made recoverable after abandonment under the abandonment costs section of the BLRA. *See* S.C. Code Ann. § 58-33-280(K).

The statute provided that the capital costs to be recovered under these mechanisms were to be evaluated and established through a single set of statutorily-defined processes under which the allowable capital costs of a baseload plant were to be forecasted, updated, reviewed, and approved. Those processes included:

1. Comprehensive preconstruction prudency reviews of proposed baseload plants and approval of forecasted cost and construction schedules for that construction, S.C. Code Ann. §§ 58-33-250-270(A),(B);

2. Adjustments to update cost and schedule forecasts as the construction plan evolved, S.C. Code Ann. § 58-33-270(E); and

3. Ongoing reviews of the prudency and appropriateness of actual expenditures as they were proposed for revised rates recovery. S.C. Code Ann. § 58-33-280.

The BLRA only contains one definition of allowable capital costs for a base load generation unit. *See* S.C. Code Ann. § 58-33-220(5) (defining "capital costs" or "plant capital costs"). Simlarly, there is also only one set of procedures for establishing the allowable capital costs of a new plant to be recovered under the BLRA. *See* S.C. Code Ann. §§ 58-33-250-270(A),(B); 58-33-270(E), and 58-33-280. Since 2009, extensive use has been made of the provision for defining and establishing the allowable capital cost of the units at issue. The decisions made in those proceedings are final, binding decisions and are not subject to relitigation here.

ARGUMENT

In this proceeding, ORS and other parties seek to ignore the binding nature of the Commission's prior decisions regarding the NND Project. This Commission should preclude them from doing so for several reasons. First, the doctrine of collateral estoppel precludes the relitigation of the Commission's prior determinations concerning the NND Project. Second, the parties in the Consolidated Dockets cannot challenge SCE&G's decision to avoid including contingency-based cost schedules in its BLRA filings because binding South Carolina Supreme Court precedent barred SCE&G from doing so. Third, binding South Carolina Supreme Court precedent requires the Commission to rule that all evidence, testimony, and argument concerning the need for SCE&G to conduct prudency reviews of the NND Project after 2009 is irrelevant. Finally, the new prudency standards contained in Act 258 cannot be applied retroactively to decisions made before it was adopted, and thus cannot be applied to any pre-abandonment decisions related to the NND Project.

I. COLLATERAL ESTOPPEL PRECLUDES THE RELITIGATION OF THE COMMISSION'S PRIOR DETERMINATIONS CONCERNING THE PROJECT.

In the testimony that it has pre-filed with this Commission, ORS has challenged the prudency of the NND Project after March 12, 2015, and, therefore, argues that costs incurred from that date forward should not be recovered under the BLRA. Several other parties in these Consolidated Dockets have taken an even more aggressive approach by challenging the prudency of the NND Project as a whole, from its inception. These issues, however, have already been adjudicated and the doctrine of collateral estoppel precludes them from being relitigated here.

A. The Doctrine of Collateral Estoppel Bars Relitigation of Issues Decided in Prior Proceedings Before this Commission and South Carolina Courts.

The doctrine of collateral estoppel – also called issue preclusion – "prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same."[2] *State v. Hewins*, 409 S.C. 93, 106, 760 S.E.2d 814, 821 (S.C. 2014) (internal citation and quotation marks omitted). Collateral estoppel can be invoked to preclude litigation with respect to any issue that was: "(1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." *Id*. (internal citation and quotation marks omitted). However, it also applies to "necessary and inevitable inferences" to the extent that "the judgment could not have been rendered as it was without deciding such points." *Carman v. S. Carolina Alcoholic Beverage Control Comm'n*, 317 S.C. 1, 6, 451 S.E.2d 383, 386 (S.C. 1994). Significantly, mutuality of parties is ***not*** a prerequisite to invoking collateral estoppel "where the party against whom estoppel is asserted had a full and fair opportunity to previously litigate the issue." *Id*. (internal citation and quotation marks omitted).

In the context of administrative decisions, the South Carolina Supreme Court has held that when a decision or action has necessarily determined the legal significance of certain facts, the significance of those facts cannot be revisited in a later proceeding. For example, in *Carman v. S. Carolina Alcoholic Beverage Control Comm'n*, the plaintiff was issued a beer and wine permit and a sale and consumption license in 1987. *Carman*, 317 S.C. at 2, 451 S.E.2d at 384.

[2] Collateral estoppel applies to administrative decisions, just as it applies to judicial determinations. *See Bennett v. S.C. Dep't of Corr.*, 305 S.C. 310, 312, 408 S.E.2d 230, 231 (S.C. 1991) ("This Court has repeatedly held that, under the doctrines of res judicata and collateral estoppel, the decision of an administrative tribunal precludes the relitigation of the issues addressed by that tribunal in a collateral action."); *Carman v. S.C. Alcoholic Beverage Control Comm'n*, 317 S.C. 1, 6-7, 451 S.E.2d 383, 386 (S.C. 1994) ("When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, courts have not hesitated to apply collateral estoppel to enforce repose.").

During the investigation conducted by the Alcoholic Beverage Control Commission (the "ABC"), it was discovered that the plaintiff had entered a *nolo contendere* plea to a solicitation of murder charge in 1982. *Id.* at 3, 451 S.E.2d at 384. It nevertheless held a hearing and its members unanimously voted to grant the plaintiff's application for a sale and consumption license and a beer and wine permit. *Id.* Two years later, the plaintiff applied for a beer and wine permit and a sale and consumption license for another location. *Id.* The ABC initially denied this second application because of the plaintiff's prior conviction for solicitation of murder. *Id.* It affirmed that denial after a hearing, finding that the plaintiff "was not of 'good moral character' within the meaning of S.C. Code Ann. § 61-5-50 and § 61-9-320," as a result of his prior conviction. *Id.* On appeal, the South Carolina Supreme Court found that the ABC was collaterally estopped from denying the plaintiff's second permit application based on his prior conviction. *Id.* at 6-7, 451 S.E.2d at 386. The Court's reasoning in *Carman* is particularly applicable to the case at hand:

> Under S.C. Code Ann. § 61-5-50(b) [ ], the Commission may only grant a license upon a finding that the applicant is of good moral character. Therefore, the Commission could not have issued Carman a license in 1987 without finding him to be of good moral character. Accordingly, we find that in 1990, the Commission was collaterally estopped from relitigating the issue of Carman's moral character based on his 1982 plea of *nolo contendere* to solicitation to commit murder because this issue was necessarily determined in the issuance of the 1987 license.

Id. (internal citations omitted). Similarly, the administrative law court has ruled that a parties cannot challenge decisions rendered by administrative agencies in subsequent renewal or update proceedings if they failed to raise those challenges in the initial proceeding. *Hubbard v. S. Carolina Dep't of Health and Envt'l Control*, Docket No. 07-ALJ-07-0594-CC, 2008 WL 2300351 (S.C. Admin. Law Judge Div. May 2, 2008) (finding that the petitioners could not

challenge DHEC's initial issuance of a permit to operate a tattoo parlor based on its proximity to a church because they should have raised that challenge in the initial administrative proceedings and were thus precluded from doing so in later proceedings).

B. Collateral Estoppel Precludes Consideration of ORS's Claim that SCE&G Should Not Be Permitted to Recover Costs Incurred on or After March 12, 2015 Because of Deficiencies in the Project Schedules Presented to the Commission at That Time.

ORS belatedly contends that the schedules for the NND Project presented by SCE&G in Docket No. 2015-103-E were purposefully deficient and inaccurate, and, therefore, all costs incurred in connection with the Project from that date forward should be disallowed.[3] But in Docket No. 2015-103-E, the Commission found after a full hearing that the project schedules that had been submitted were, in fact, reasonable, prudent, and sufficient. A year later, it reaffirmed that decision in Docket No. 2016-223-E. Accordingly, the current challenge to the sufficiency of the cost and construction schedules presented to the Commission in 2015 is precluded by the doctrine of collateral estoppel.

The principal issues in Docket No. 2015-103-E were resolved by a settlement agreement (the "2015 Settlement Agreement") which ORS, the South Carolina Energy Users Committee ("SCEUC"), SCE&G, and others signed. The Settlement Agreement included as attachments the specific cost and construction schedules which the Commission was asked to affirm, and which the Commission then did affirm. (*See* Settlement Agreement, Exs. 1-2.) The body of the agreement states that, "[t]he Parties agree that the modified construction schedule and capital cost schedule [as attached] are not the result of imprudence by SCE&G and are fully consistent with the requirements of BLRA." *Id.* at 7. In the resulting order, which no party appealed, the Commission found that:

[3] The allegations of other parties are more extreme, in some cases, but this same analysis applies equally to them.

> The evidence of record also shows that the updated construction schedule presented here has undergone a detailed review and assessment by SCE&G and ORS. SCE&G's witness Mr. Byrne testified that in 2013, SCE&G insisted that WEC/CB&I [Westinghouse and its consortium partner Chicago Bridge & Iron] conducted a full review of the project schedule after it became apparent to SCE&G that delays in submodule production had made the existing project schedule unattainable. In the third quarter of 2014, WEC/CB&I produced a new Revised, Fully Integrated Construction Schedule for the project which provided an item-by-item sequencing of the individual scopes of work required to complete the project that involved thousands of schedule activities and thousands of pages of backup documentation. Tr. at 270, 272. The initial versions of the schedule provided by WEC/CB&I proposed several mitigation alternatives to accelerate the construction schedule, each involving specific levels of additional cost to the project. SCE&G then began an extensive review of the New Revised, Fully-Integrated Construction Schedule with WEC/CB&I to determine its reasonableness and accuracy. SCE&G convened a diverse team of accounting, project management and engineering personnel with experience in nuclear and non-nuclear power plant projects to review this data. Tr. at 614-15. This team evaluated and selected schedule mitigation alternatives with WEC/CB&I. The review lasted for several months. It resulted in SCE&G's determination in March of 2015 that the schedules attached to the Petition in this matter were the appropriate schedules for the project given the information currently available. Tr. at 219. SCE&G's witnesses, Mr. Byrne and Mr. Jones, testified to the fact that in their opinion the construction schedule presented here represents a reasonable and prudent schedule for completing the construction of the Units. Tr. at 220, 274, 556. ***ORS has similarly reviewed and evaluated the schedule and supports its adoption as the anticipated construction schedule for the Units under SC Code Ann. § 58-33-270 (B) (Supp. 2014)***. Tr. at 699 – 701.

(Order No. 2015-661 at 20-21 (emphasis supplied).) The Commission went on to find that "ORS also reviewed the EAC Cost Schedule [estimated at completion cost schedule prepared by WEC/CB&I] and concluded that it was appropriate for inclusion in the BLRA cost schedule for the project, as ORS's agreement to the Settlement Agreement demonstrates." (*Id.* at 24.) Thus, there can be no question that the issue of the sufficiency of the construction schedule and associated costs was fully litigated in Docket No. 2015-103-E, and conclusively decided in Order No. 2015-661, and that collateral estoppel applies to prevent relitigating them here.

In addition, the Commission specifically reviewed and resolved the issue of whether poor productivity factors and other sources of delay and inefficiency posed unacceptable risks to the construction schedule and cost schedule in that same proceeding. The Commission found that such risks existed but nonetheless found that the schedules presented were the appropriate schedules to be approved under the BLRA even considering those risks:

> As indicated above, currently WEC/CB&I is not achieving either the original or updated productivity assumptions. Tr. at 257. The Company's witness Mr. Byrne testified that SCE&G has challenged WEC/CB&I very directly on this point. WEC/CB&I's leadership is fully aware of the challenges it faces in improving these labor factors, and that achieving these factors is important to meeting both the cost and construction schedules under review here. In response, WEC/CB&I has assured SCE&G that it will make the required improvements. To substantiate this, WEC/CB&I points to several positive factors: (a) design finalization of the nuclear island is nearing completion which should minimize construction inefficiencies due to unanticipated design changes, (b) WEC/CB&I and subcontractor personnel have gained significant experience in nuclear safety construction since the project began, and (c) the lessons learned on Unit 2 are being applied to the construction of Unit 3 in a way that has improved productivity on that Unit. Tr. at 257-258. In spite of these assurances, questions remain as to whether WEC/CB&I will be able to meet the updated productivity assumptions. Tr. at 258.

(*Id*. at 27-28.) The Commission went on to conclude:

> Based on the evidence of record in this proceeding, the Commission finds that it is reasonable and prudent to base the labor cost anticipated to complete the project on the revised productivity factors and calculations proposed by WEC/CB&I. Given WEC/CB&I agreement to achieve that level of productivity, it would not be appropriate or helpful for SCE&G to insist on less demanding productivity forecasts. Nor is SCE&G in a position where it can propose that an amount of contingency be added to the anticipated construction costs against the possibility that this challenging level of productivity will not be achieved.

(*Id*. at 28.)

Furthermore, the Commission clearly based its acceptance of the cost and schedule risks, in part, on ORS's own testimony and agreement:

> In supporting the Settlement Agreement, Mr. James testified that "based on ORS's review; SCE&G's in-depth evaluation; and SCE&G's adoption of the proposed schedule and budget, ORS finds that the cost estimates [approved in the Settlement Agreement] have sufficient support and provide a reasonable basis to proceed with the Units." Tr. 705. The Commission has reviewed Mr. James' testimony against the record as a whole, including the extensive testimony and evidence provided by SCE&G concerning its review and analysis of the EAC Cost Estimates and other cost estimates and methodology by which they were created. The Commission finds that ORS's conclusions concerning the cost estimates presented here are fully supported by the record in this proceeding.

(*Id*. at 57.)

A year later, when SCE&G initiated Docket No. 2016-223-E, there had been several significant developments concerning the NND Project. CB&I had exited the Project, the Consortium had effectively been terminated, and a new contractor, the Fluor Corporation ("Fluor"), had been hired to manage on-site construction. (*See* Order No. 2016-794 at 14-15.) SCE&G presented new construction schedules to the Commission, which ORS reviewed. ORS, SCEUC, and other parties again entered into a settlement agreement (the "2016 Settlement Agreement"), which included agreed-to cost and construction schedules as attachments, and urged the Commission to adopt them. The Commission did adopt them in Order No. 2016-794.

Thus, since March 12, 2015, the date targeted by ORS for its claimed disallowances, the Commission has twice issued orders – supported by, and, in fact, requested by ORS – upholding the sufficiency of the construction schedule and associated cost forecasts, and recognizing the risks posed by productivity factors, construction efficiency, and the like. The doctrine of collateral estoppel prevents the relitigation of those issues here.

C. Prior Commission Orders Preclude Consideration of Claims that SCE&G Should Be Denied Recovery of Project Costs Incurred before June 30, 2016.

In each of the five update orders since 2009, the Commission adopted costs schedules affirming the prudency of actual capital costs incurred up to a date specified in the cost

schedules, which is generally several months prior to the date of the order. For example, the last of these orders, Order No. 2016-794, affirms actual project costs up through March of 2016. (See Order No. 2016-794, Ex. 2.) The other four orders similarly affirm the project costs up to the date contemporaneous with their entry.

The Commission has also specifically established the allowable capital costs for the Project up to June 30, 2016 in nine revised rate adjustments beginning with Order No. 209-104(A).[4] In these nine proceedings, the over-arching prudency decisions made in Orders Nos. 2009-104(A), Order No. 2015-661 and Order No. 2016-794 applied to the project generally. But in addition, ORS and other interested persons had the right to challenge specific items of cost that had been recently incurred as being inappropriate or imprudent. S.C. Code Ann. § 58-33-275(E). These nine proceedings establish that the appropriate capital cost of the project as incurred was approximately $3.7 billion as of June 30, 2016.[5] (*See* Order Nos. 2011-738, 2012-761, 2013-680(A), 2014-785, 2015-712, 2016-758.) Because these allowable BLRA capital costs have been established in final orders of the Commission, the doctrine of collateral estoppel prevents them from being challenged here.[6]

In all eight revised rates proceedings that followed the initial BLRA Order, the Commission's review was based on reports from ORS, which established the allowable costs for

[4] The initial BLRA order for the Project – Order No. 2009-104(A) – approved an initial increment of project capital costs for revised rates recovery. These capital costs are also included in the cumulative costs approved for the Project.

[5] These amounts have not been adjusted for the transfer of capital costs associated with non-abandoned aspects of the Project to Transmission or Generation Plant in Service or Construction Work in Progress. The cumulative amount so established is an amount which is larger than the amount SCE&G proposed to recover under either the Customer Benefits Plan or the No Merger Benefits Plan.

[6] It is also the case that the Commission prospectively approved approximately $6 billion of expenditures on the Project through the close of 2017. (Order No. 2016-794, Ex. 2.) This ruling also creates collateral estoppel as to claims that costs incurred after June 30, 2016 are imprudent based on facts or claims arising before the date of Order No. 2016-758.

recovery under the BLRA. For example, in Docket No. 2016-224-E, the review focused on ORS's "Report on South Carolina Electric & Gas Company's Annual Request for Revised Rates," dated August 29, 2016. That report was based on ORS's continuing oversight, review, and audit of SCE&G's expenditure on the NND Project and related matters. It identified those costs which ORS determined should be deferred or excluded from BLRA consideration, as well as those which were proper and allowable. The Commission, in its resulting order, found that ORS "had conducted the statutorily-required review of SCE&G's actual CWIP expenditures through June 30, 2016, and compared those figures to the forecasted amounts set forth in Exhibit D to the Request," and that ORS had "determine[d] that SCE&G's adjusted incremental CWIP for the review period was $574,150,000, net of deferrals." (Order No. 2016-758 at 3.) The Commission accepted ORS's representation that the $574 million that SCE&G had spent since June 2015 was properly recoverable under the BLRA, and set SCE&G's revised rates based on that amount. (*Id*.)

The Commission's acceptance of SCE&G's expenditures in Docket No. 2016-224-E as valid capital costs for the NND Project, and thus recoverable under the BLRA, was necessary to its decision concerning the recoverability of those costs under the BLRA. The same is true of the costs determined in each of the seven prior revised rates orders entered by the Commission establishing the allowable costs actually spent on the Units. (*See* Order No. 2016-794.) Accordingly, the parties in the Consolidated Docket are now precluded from challenging the $3.7 billion in costs approved for BLRA recovery in those orders.

D. The Parties in the Consolidated Dockets Are Collaterally Estopped From Challenging SCE&G's Oversight of the NND Project, Westinghouse, and the Consortium.

ORS has also pre-filed testimony in the Consolidated Dockets concerning SCE&G's purportedly ineffective oversight of the NND Project. There is no factual basis to this claim. In any event, as a legal matter, it is precluded because issues concerning SCE&G's oversight of the NND Project were open to litigation and, in fact, were litigated in the prior BLRA proceedings. Those issues were necessary to the determinations made in those proceedings because a finding that SCE&G was imprudent in its management of the Project would have precluded the Commission from issuing the relief it ordered by approving as prudent the costs it approved. The parties to the Consolidated Dockets, therefore, are collaterally estopped from challenging SCE&G's past oversight of the Project.

While the issue of oversight was present in all BLRA update proceedings since 2009, this issue arose most pointedly with reference to SCE&G's enforcement of contractual claims against Westinghouse and the Consortium in the 2015 proceedings. In Order No. 2015-661, the Commission summarized the testimony related to this matter, and specifically found that SCE&G's approach to managing Westinghouse and the Consortium was appropriate:

> As the Company's witness, Mr. Byrne, testified, one of the most difficult challenges facing the project at this time is for SCE&G to effectively enforce its rights as Owner under the EPC Contract while at the same time maintaining an effective working relationship with WEC/CB&I. Tr. at 253-254. The Commission agrees, as Mr. Marsh testified, that maintaining an effective working relationship between SCE&G and WEC/CB&I is necessary to minimize further delay and to ensure the project is completed in as timely and efficient way as possible. Tr. at 154-156. The Commission also agrees that in enforcing the EPC Contract, it is important that SCE&G take care not to deliberately violate the terms the EPC Contract without justification or legal cause . . . .
>
> Completing the project in a timely and efficient way is the goal that best serves the needs of SCE&G and SCE&G's customers. SCE&G's approach to disputes

> with WEC/CB&I must be balanced against that goal . . . . In this context, the Commission finds that SCE&G's actions related to the [contractually required] 90% payments are appropriate in enforcing the terms of the EPC Contract.

(Order No. 2015-661 at 34-35.)

Moreover, the question of SCE&G's ability to oversee the construction of the Units effectively was litigated in Docket No. 2008-196–E, and was also an issue in the subsequent cases, in which change orders, schedule changes, and increased oversight staffing were at issue. After seven contested case hearings in which oversight and supervision of the Project were important issues, ORS and the other parties to these Consolidated Dockets are collaterally estopped from challenging SCE&G's past oversight and supervision now.

E. ORS and Other Parties Are Collaterally Estopped from Claiming That They Were Denied Information Regarding the NND Project.

The doctrine of collateral estoppel prevents a party from arguing that a position affirmatively taken and accepted by the judicial decision maker in a prior proceeding was based on inadequate information and therefore should be reopened. *Hewins*, 409 S.C. at 106, 760 S.E.2d at 821. That, however, is precisely what ORS seeks to do here, arguing that, had it been provided with better information concerning construction schedules, productivity issues, and risks to the NND Project in 2014, it would have successfully challenged the 2015 update request and all subsequent orders. More specifically, ORS contends that those orders should be treated as null and void because ORS was not provided with information regarding Bechtel's review of the NND Project.

This argument is demonstrably false. ORS's expert witness – Mr. Gary Jones – testified at a prior deposition that: (a) he was aware that Bechtel had conducted an analysis of the NND Project; (b) he had discussed the existence of that analysis with certain NND Project team

members; (c) he was informed that the Bechtel assessment did not contain meaningful new information concerning the NND Project; (d) once he became aware of Bechtel's report, he concluded that the substance of the information Bechtel provided was, except for a handful of items that Mr. Jones acknowledged to be largely insignificant, already known and that the issues identified were in the process of being addressed; and (e) as to schedule, Mr. Jones was well aware of information that would have allowed him to develop a schedule analysis rivaling that of Bechtel. (*See* 10/05/18 Jones Dep. 83:13-106:12.)[7] This admitted knowledge of Bechtel's assessment and the substance of the information it includes precludes ORS from claiming that SCE&G acted in bad faith and defrauded it by concealing material information. *See McLaughlin v. Williams*, 379 S.C. 451, 457-58, 665 S.E.2d 667, 671 (Ct. App. 2008) (dismissing a fraud claim as a matter of law because the plaintiff knew the truth of the matter about which he was asserting fraud, thereby destroying any argument of reasonable reliance on a misstatement by the defendant); *Bivens v. Watkins*, 313 S.C. 228, 235, 437 S.E.2d 132, 136 (Ct. App. 1993) (finding that the plaintiff's awareness of the business "undercuts the reliance and causation components of any cause of action based on misrepresentation and fraudulent concealment").

Furthermore, even if these allegations had substance, they would not defeat collateral estoppel. As the South Carolina Supreme Court has recognized, only "extrinsic fraud" provides a basis for not applying the doctrine of collateral estoppel. *Aaron v. Mahl*, 381 S.C. 585, 593, 674 S.E.2d 482, 486 (S.C. 2009). "[A]llegations that a party failed to disclose documents generally amounts to intrinsic, rather than extrinsic fraud." *Id.* The law is clear that parties are generally not entitled to relief from a judgment in the case of intrinsic fraud. *Id.*; *see also Chewning v. Ford Motor Co.*, 354 S.C. 72, 81-82, 579 S.E.2d 605, 610 (S.C. 2003) ("Equitable

[7] The relevant portion of Mr. Jones's deposition testimony are attached hereto and incorporated herein as ***Exhibit 2***.

relief from a judgment is denied in cases of intrinsic fraud, on the theory that an issue which has been tried and passed upon in the original action should not be retried in an action for equitable relief against the judgment, and that otherwise litigation would be interminable.")

Moreover, the orders entered in Docket Nos. 2015-103-E and 2016-223-E – which were entered after Mr. Jones and ORS became aware of the Bechtel report – include affirmative findings that at the time of the proceeding, ORS had sufficient information to review the cost and construction schedules for this Project and that, in fact, such a review had been successfully conducted. (*See* Order Nos. 2015-661, 2016-794; *see also* Jones Dep. 83:13-106:12.)

As further proof of this fact, the 2015 Settlement Agreement, which this Commission ultimately incorporated into Order No. 2015-661, stipulated that:

> in connection with this case as well as since the inception of this project, ORS has exercised its rights and fulfilled its responsibilities under S. C. Code Ann. § 58-33-277 (Supp. 2014) to monitor the status of the project, by, among other things, routinely and regularly observing the progress of the plant construction and submodule production, requesting and reviewing substantial amounts of relevant financial data from the Company, auditing the quarterly reports submitted by the Company pursuant to the BLRA, inspecting the books and records of the Company regarding the plant and physical progress of construction, and reviewing in detail SCE&G's request to modify the Units' construction schedule and capital cost schedule in the above-captioned matter . . . .
>
> ***SCE&G has provided information deemed satisfactory by ORS and SCEUC to support the relief requested in the Petition*** that the delay in the Substantial Completion Dates and other changes in construction, construction oversight and operational readiness requirements result in necessary and reasonable modifications to the capital cost and BLRA milestone Construction schedule under the terms of the BLRA and are not the result of imprudence on the part of the Company.

(Order No. 2015-661, Ex. 3 (2015 Settlement Agreement) at 4-5 (emphasis added).) These are express representations ORS made to the Commission through its endorsement of the Settlement Agreement. That settlement agreement goes on to say that, "[t]he Parties agree that the modified

construction schedule and capital cost schedule are not the result of imprudence by SCE&G and are fully consistent with the requirements of BLRA." (*Id.* at 7.)

In issuing Order No. 2015-661, the Commission found that:

> The Settlement Agreement here was entered into after all parties had a full opportunity to conduct discovery on the matters at issue in this case, and after SCE&G had submitted approximately 253 pages of prefiled testimony and exhibits setting out in detail the reasons for the changes in construction schedule anticipated cost schedule for the project . . . . Furthermore, the settlement testimony of the ORS's witness, Mr. Anthony James, shows that the Settlement Agreement is based on ORS's extensive oversight of costs and construction schedules for the project, oversight which is been on-going since 2009.

(*Id*. at 14.)

Thus, there can be no question that the issue of whether ORS and, by inference, the public, had a reasonable opportunity to review and evaluate the issues related to the cost and construction schedules for the Project was raised and litigated in past proceedings. It is not open to relitigation in these Consolidated Dockets.

F. The Parties in the Consolidated Dockets Are Collaterally Estopped from Challenging the Prudency of the NND Project.

Some parties in the Consolidated Dockets have pre-filed testimony suggesting that they seek to challenge the prudency of the NND Project as a whole. The doctrine of collateral estoppel, however, prohibits such challenges because the NND Project's prudency was conclusively and finally determined by the Base Load Review Order (Order No. 2009-104(A).)

When SCE&G submitted its Combined Application under the BLRA, this Commission conducted a comprehensive pre-prudency review of the selection of the technology, contractors and subcontractors for the NND Project, the terms of the engineering procurement and construction agreement ("EPC Contract") under which the Project was to be constructed, and the projected costs and construction schedule as forecasted at that time. (*See generally* Docket No.

2008-223-E.) It ultimately entered the Base Load Review Order, which approved SCE&G's application and authorized the NND Project. (Order No. 2009-104(A).) In that Base Load Review Order, the Commission acknowledged that it was required "to make a comprehensive assessment of the decision to build the plant to determine if that decision is reasonable and prudent based on all available information." (*Id*. at 58.) The Commission expressly found that the NND Project was prudent *because* of SCE&G's selection of AP1000 technology and its decision to select Westinghouse as the nuclear system supplier. (*Id*.; *see also id*. at 61-69 (providing a detailed explanation as to why the Commission found the selection of the AP1000 technology and Westinghouse to be prudent).) Moreover, the Commission approved the EPC Contract because it "contain[ed] provisions that [were] reasonable and prudent and allow[ed] SCE&G to protect its interest and the interests of its customers in the quality of the work done to construct Units 2 and 3." (*Id*. at 75.) Even ORS's experts – William R. Jacobs, Ph.D and Mark W. Crisp – testified that ORS had conducted "an extensive review of the EPC Contract," and that "its terms [were] reasonable and appropriate, consistent with industry standards, and reasonably protect[ed] SCE&G's and its customers' interests." (*Id*. at 78.)

Pursuant to the BLRA, the Commission specifically approved SCE&G's choice of the Westinghouse technology, and the terms of the EPC Contract. (Order No. 2009-104(A).) In each update docket, the Commission affirmed that the changes made to cost and construction schedules were not based on imprudence. (*Id*.) Thus, these orders necessarily constitute the adjudication of these issues and the parties in the Consolidated Dockets are estopped from relitigating them here. *Carman*, 317 S.C. at 6-7.

II. THE PARTIES IN THE CONSOLIDATED DOCKETS CANNOT CHALLENGE SCE&G'S DECISION TO AVOID USING CONTINGENCY-BASED COST SCHEDULES BECAUSE BINDING SOUTH CAROLINA PRECEDENT BARRED SCE&G FROM INCLUDING CONTINGENCIES IN BLRA COST SCHEDULES.

Several parties in the Consolidated Dockets have pre-filed testimony indicating that they intend to challenge SCE&G's decision to use the hard-budgeted, pre-contingency cost schedules provided by Westinghouse in its BLRA filings in 2015 and 2016. The Commission should exclude all testimony, evidence, and argumentation on this point because the South Carolina Supreme Court's decision in *S. Carolina Energy Users Committee v. S. Carolina Pub. Serv. Comm'n*, 388 S.C. 486, 697 S.E.2d 587 (S.C. 2010) [hereinafter *S.C. Energy Users I*] precluded SCE&G from recognizing such contingency costs in BLRA cost schedules.

In preparing the capital cost budgets that it submitted to the Commission in 2008, SCE&G identified and disclosed key risk factors for the project. It sought to quantify their impact on the project costs by calculating contingencies to apply to each of the categories costs associated with the Project. (*See* Order No. 2009-104(A) at 90-91, 96-98.) As the Commission found, "[t]hese contingency percentages were determined as a matter of sound in engineering judgment based on SCE&G's assessment of the potential for actual cost to be greater than forecasted cost based on such things as . . . the possibility that the ***estimates of the units of time and materials used to price the project might understate actual requirements***." (Order No. 2009-104(A) at 96 (emphasis added).) Of course, the "estimates of units of time and materials needed to price the project" are the estimates on which productivity factors are measured.

In *S.C. Energy Users I*, SCEUC challenged the Commission's finding that the BLRA allowed SCE&G to include those contingency costs – totaling $438,293,000 – as a component of capital costs. *S.C. Energy Users I*, 388 S.C. at 490, 697 S.E.2d at 589. On appeal, the Supreme

Court found that cost contingencies based on engineering concerns about the risks of not achieving these forecasted productivity factors could not be included in the cost schedules for the NND Project. *Id*. at 491-96, 697 S.E.2d at 590-93. In keeping with this ruling, in the 2015 and 2016 proceedings SCE&G presented the actual cost schedules that were provided by Westinghouse and the Consortium and contractually committed to by them. The Commission clearly recognized that to be the case and, in its order in the 2015 BLRA proceeding, found that SCE&G was not "in a position where it c[ould] propose that an amount of contingency be added to the anticipated construction costs against the possibility that this challenging level of productivity [as contractually committed to by Westinghouse and the Consortium] will not be achieved." (Order No. 2015-661 at 28.)

The decision in *S.C. Energy Users I* was in 2015 and 2016 and is today binding precedent and thus precludes the parties in the Consolidated Dockets from presenting testimony that asserts that in its BLRA filings in 2015 and 2016, SCE&G should have presented contingency-based budget estimates reflecting the risk that Westinghouse would not meet its budgeted productivity factors. The South Carolina Supreme Court's decision is amply clear: SCE&G was to file hard-budgeted numbers only and seek updates to those budget projections if risks surrounding them – including risks associated with productivity factors-- later caused them to increase.

III. BINDING SUPREME COURT PRECEDENT REQUIRES THIS COMMISSION TO EXCLUDE ALL EVIDENCE AND TESTIMONY CONCERNING THE NEED FOR SCE&G TO CONDUCT PRUDENCY REVIEWS OF THE NND PROJECT AFTER 2009.

In 2014, the South Carolina Supreme Court – in a challenge brought by the SCEUC and the Sierra Club – held that after the initial prudency review, the BLRA did not require the Commission to conduct a prudency evaluation of continuing the NND Project during subsequent

proceedings. *S. Carolina Energy Users Committee v. S. Carolina Elec. and Gas*, 410 S.C. 348, 360, 764 S.E.2d 913, 918 (S.C. 2014) [hereinafter *S.C. Energy Users II*]. The Court ruled that: "'[D]eterminations under Section 58-33-275(A) ***may not be challenged or reopened in any subsequent proceeding***[.]'" *Id*. (quoting S.C. Code Ann. § 58-33-275(B)) (emphasis added).

Despite the decision in *S.C. Energy Users II*, several of the parties in the Consolidated Dockets have pre-filed testimony in which their witnesses purport to challenge the financial analyses performed in prior dockets in order to suggest that continuing the NND Project at various points in time was not prudent. For example, Norman K. Richardson, Jr. – whose testimony has been proffered by ORS – describes the purpose of his testimony as follows:

> [T]o present the results of an analysis comparing the costs, as of March 31, 2015, of either completing construction of the V.C. Summer Units 2 and 3 Project ("NND Project") 1) on a schedule with completion dates of June 2021 for Unit 2 and June 2022 for Unit 3, or 2) abandoning the NND Project and constructing two combined cycle gas plants of the same size with the same online dates instead. [And to] address deficiencies in the economic analysis presented by [SCE&G] in Docket 2016-223-E ("Lynch 2016 Study") and in this docket ("Lynch 2017 Studies").

(09/28/18 Richardson Testimony 2:14-21.) His ultimate conclusion is that the analyses SCE&G presented to the Commission in 2015 and 2016 were insufficient and, had they been accurate, SCE&G should have been ordered to abandon the NND Project then. (*See id*. at 6:20-11:8.) This testimony cannot be squared with the Supreme Court's binding decision in *S.C. Energy Users II*.

The Commission should enter an order declaring that the parties in these Consolidated Dockets cannot challenge or reopen the prudency determinations made in the Base Load Review Order, or subsequent orders of this Commission, and excluding all such testimony, evidence, and argument from the upcoming hearing.

IV. THE NEW PRUDENCY STANDARDS CONTAINED IN ACT 258 CANNOT BE APPLIED RETROACTIVELY TO DECISIONS MADE BEFORE IT WAS ADOPTED.

Several parties in the Consolidated Dockets have submitted pre-filed testimony that seeks to assess SCE&G's actions and decisions concerning the NND Project through the lens of the prudency definitions set forth in Act 258. (*See, e.g.*, James Testimony 3:13-24; Jones Testimony 4:1-12.) However, well-established principles of South Carolina jurisprudence prevent Act 258 from being applied retroactively to the NND Project. There are three grounds upon which SCE&G seeks a ruling from the Commission that Act 258 cannot be applied retroactively, and for excluding all testimony, evidence, and argument based on that premise. First, binding precedent from the South Carolina Supreme Court prohibits Act 258 from being retroactively applied to alter the BLRA and the prudency determinations rendered thereunder. Second, Act 258's express language does not refute the robust presumption against statutory retroactivity. Finally, Act 258 cannot be interpreted to apply retroactively because doing so would render it unconstitutional and violate the established rule of statutory construction requiring the adoption of constitutional interpretations over potentially unconstitutional interpretations.

A. *Binding Supreme Court Precedent Prohibits Act 258 From Being Retroactively Applied to Alter the BLRA and the Prudency Determinations Rendered Thereunder.*

In 1974, the South Carolina Supreme Court determined that the General Assembly could not, consonant with the separation of powers doctrine, enact a statute in order to overturn the result in a case that the Supreme Court had already decided. *Lindsay v. Nat'l Old Line Ins. Co.*, 262 S.C. 621, 207 S.E.2d 75 (1974). It held that:

> [A] judicial interpret[ation] of a statute is determinative of its meaning and effect, and any subsequent legislative amendment to the contrary will only be effective from the date of its enactment ***and cannot be applied retroactively***.

Id. at 629, 207 S.E.2d at 78 (emphasis added). That principle necessarily applies here and prevents the retroactive application of Act 258.

As discussed above, the Supreme Court interpreted the BLRA in *S.C. Energy Users II* and concluded that prior prudency determinations made under the BLRA "'***may not be challenged or reopened in any subsequent proceedings***.'" *S.C. Energy Users II*, 410 S.C. at 359, 764 S.E.2d at 918 (quoting S.C. Code Ann. § 58-33-275(B)) (emphasis added). Because the South Carolina Supreme Court rendered a judicial interpretation of the BLRA, the General Assembly lacks the power to enact retroactive amendments to its scope and interpretation. *Lindsay*, 262 S.C. at 629, 207 S.E.2d at 78. Setting aside all other arguments regarding retroactivity, this binding judicial holding precludes any challenge to the pre-abandonment prudency determinations made with respect to the NND Project, and the Commission should exclude all testimony and evidence seeking to challenge such determinations from the upcoming hearing.

B. *Act 258's Express Language Does Not Refute the Robust Presumption Against Statutory Retroactivity.*

South Carolina courts – like their federal counterparts – "employ a robust presumption against statutory retroactivity." *Kirven v. Cent. States Health & Life Co., of Omaha*, 409 S.C. 30, 39-40, 760 S.E.2d 794, 799 (2014) (internal citation and quotation marks omitted). This presumption "is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994). The South Carolina Supreme Court has described this strong presumption as follows:

> Under this presumption, courts assume that statutes operate prospectively only, to govern future conduct and claims, and do not operate retroactively, to reach conduct and claims arising before the statute's enactment. Since legislatures

> generally intend statutes to apply prospectively only, this rule of statutory construction is a means of giving effect to legislative intent.

Id. (internal citations and quotation marks omitted). It can only be rebutted if the legislature "expressly prescribe[s] the statute's temporal reach" to include past claims and conduct. *Id*. Courts apply a "demanding" standard that "require[s] prescription that is truly express and unequivocal" to satisfy this requirement. *Ward v. Dixie Nat. Life Ins. Co.*, 595 F.3d 164, 173 (4th Cir. 2010). Language that addresses the statute's substantive reach, without specifically addressing its temporal scope, "falls short" of satisfying this standard. *Id*.

In order to overcome the presumption against retroactivity, "a legislature must clearly demonstrate an intent to apply the statute retroactively." *Ward*, 595 F.3d at 174. "This standard is undeniably high, requiring an expression of legislative intent that is obvious from the statute's text." *Id*. (citing *S.C. Dep't of Revenue v. Rosemary Coin Machines, Inc.*, 339 S.C. 25, 528 S.E.2d 416, 418 (2000). The applicable standard has been aptly summarized as follows:

> Usually, legislative history is an insufficient indicia of intent, and courts instead demand express words evincing an intent that it be retroactive or words necessarily implying such an intent. The words used in the statute must be so clear, strong, and imperative that no other meaning can be annexed to them, or the intention of the legislature must be such that it cannot be otherwise satisfied. In general, courts will apply a statute retroactively only if that result is so clearly compelled as to leave no room for reasonable doubt, and will refuse to apply a statute retroactively absent statutory language so clear that it could sustain only one interpretation.

Ward, 595 F.3d at 174 (internal citations and quotation marks omitted).

Act 258 states that it "takes effect upon approval by the Governor and applies to all cases, proceedings, petitions, or matters pending before the Public Service Commission or in any other court or venue ***on or after the effective date of this act***." 2018 S.C. Act 258, § 12. This language is critical to the analysis at hand because South Carolina courts have repeatedly held

that the inclusion of an "effective date" is inconsistent with legislative intent to apply a statute retroactively. *See, e.g., S. Carolina Dep't of Revenue v. Rosemary Coin Machines, Inc.*, 339 S.C. 25, 528 S.E.2d 416, 418 (S.C. 2000); *Pulliam v. Doe*, 246 S.C. 106, 142, S.E.2d 861, 863 (1965). Or, as the United States Supreme Court has held, "[a] statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date." *Landgraf*, 511 U.S. at 257. Said differently, the express language of Act 258 precludes its retroactive application.

C. ***Act 258 Cannot Be Applied Retroactively Because Doing So Would Violate the Rule of Constitutional Construction Requiring Statues to Be Interpreted in a Way that Avoids Constitutional Conflicts.***

Though the General Assembly has the power to enact a retroactive statute, that power is "[s]ubject to constitutional limitations." *Harleysville Mut. Ins. Co. v. State*, 401 S.C. 15, 24-25, 736 S.E.2d 651, 655-56 (2012). Indeed, "the very standard for determining whether a statute operates retroactively requires analyzing its potential to divest or limit a vested right." *Gatewood v. S. Carolina Dep't of Corr.*, 416 S.C. 304, 320-21, 785 S.E.2d 600, 609 (Ct. App. 2016), *reh'g denied* (June 2, 2016), *cert. denied* (May 30, 2017); *see also Dunham v. Davis*, 229 S.C. 29, 35, 91 S.E.2d 716, 718 (S.C. 1956) (holding that the retroactive application of a statute relaxing the stringency of a tax sale procedure to respondents whose rights in certain real property vested prior to the statute's enactment "would be clearly unconstitutional as depriving them of property without due process of law"). Though the Commission does not have the power or authority to adjudicate facial challenges to a statute's constitutionality, *Ward v. State*, 343 S.C. 14, 19-20, 538 SE.2d 245, 247-48 (S.C. 2000), it need not make such a determination here. Rather, the Commission need only rely on the valid constitutional concerns to avoid the construction of Act 258 that would apply it retroactively. *See Travelscape, LLC v. S. Carolina*

Dep't of Revenue, 391 S.C. 89, 109, 705 S.E.2d 28, 28 (S.C. 2011) (finding that, while an administrative court "cannot rule on a facial challenge to the constitutionality of a regulation or statute," it "can rule on whether a law as applied violates constitutional rights"). This is because "[c]onstitutional constructions of statutes are not only judicially preferred, they are mandated; a possible constitutional construction must prevail over an unconstitutional interpretation." *Henderson v. Evans*, 268 S.C. 127, 132, 232 S.E.2d 331, 333 (S.C. 1977); *see also Peoples Nat'l Bank of Greenville v. S. Carolina Tax Comm'n*, 250 S.C. 187, 181, 156 S.E.2d 769, 771 (S.C. 1967) ("Where there are two possible constructions, one rendering the statute unconstitutional and the other constitutional, it is the duty of the court to adopt that construction which will uphold the validity of the statute"). In this case, retroactively applying Act 258 to SCE&G would render the statute unconstitutional and violative of both SCE&G's substantive due process rights and the Takings Clause of the United States and South Carolina constitutions.

1. Applying Act 258 Retroactively Would Violate SCE&G's Substantive Due Process Rights.

Retroactive statutes are particularly susceptible to due process challenges for two reasons. First, the legislature has "unmatched powers . . . to sweep away settled expectations suddenly." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994). Second, "political pressure poses a risk that [the legislature] may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals," or for that matter, utilities. *Id*. Where the retroactive application of a statute would violate due process rights, that statute must "be applied prospectively only." *Wilson v. Jones*, 281 S.C. 230, 233, 314 S.E.2d 341, 343 (S.C. 1984).

In assessing whether a retroactive statute violates a person's substantive due process rights, the key inquiry is "whether the new provision attaches a new legal consequence to events

completed before its enactment." *Landgraf*, 511 U.S. at 270. To interpret Act 258 as applying to events, decisions, and contracts that predate its enactment by nearly a decade would clearly place the statute at risk. *See, e.g.*, *United States v. Carlton* 512 U.S. 26, 38 (1994) (O'Connor, J., concurring) ("A period of retroactivity longer than the year preceding the legislative session in which the law was enacted would raise, in my view, serious constitutional questions."). In fact, in *Rivers v. State*, the South Carolina Supreme Court found that legislation retroactively halving a prior decrease in the capital gains tax rate violated taxpayers' due process rights under both the federal and state constitutions. 327 S.C. 271, 279, 490 S.E.2d 261, 265 (S.C. 1997). In doing so, the Supreme Court stated that, there comes a point when "the government's interest in meeting its revenue requirements must yield to taxpayers' interest in finality regarding tax liabilities and credits," and that the two to three year retroactivity period at issue in that case was "simply excessive." *Id*. at 279, 490 S.E.2d at 265. To protect "[b]oth stability of investment and confidence in the constitutional system," the Commission should refrain from interpreting Act 258 to apply retroactively. *E. Enterpr. v. Apfel*, 524 U.S. 498, 549 (1998) (Kennedy, J., concurring).

2. *Interpreting Act 258 to Apply Retroactively Could Result in an Unconstitutional Taking of SCE&G's Property.*

The Takings Clause provides a "safeguard against retrospective legislation concerning property rights." *Apfel*, 524 U.S. at 534. It mandates that "[n]o person shall be . . . deprived of . . . property, without due process of law, ***nor shall private property be taken for public use, without just compensation***." U.S. Const. amend. V (emphasis added). Furthermore:

> [D]ue process protection for property must be understood to incorporate our settled tradition against retroactive laws of great severity. Groups targeted by retroactive laws, were they to be denied all protection, would have a justified fear that a government once formed to protect expectations can now destroy them.

Apfel, 524 U.S. at 549 (Kennedy, J., concurring).

A statute will be held to have an impermissible retroactive effect pursuant to the Takings Clause when it "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or consideration already past." *Immigration and Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 321 (2001) (internal citation and quotation marks omitted). Determining whether a statute can be retroactively applied and comport with the United States Constitution requires courts to "be informed and guided by 'familiar considerations of fair notice, reasonable reliance, and settled expectations.'" *Martin v. Hadix*, 527 U.S. 343, 358 (1999) (quoting *Landgraf*, 511 U.S. at 270).

In South Carolina, property rights are "created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Snipes v. McAndrew*, 280 S.C. 320, 324, 313 S.E.2d 294, 297 (S.C. 1984) (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)). *See also Pure Oil Div. v. City of Columbia*, 254 S.C. 28, 34, 173 S.E.2d 140, 143 (S.C. 1970); *Nuckles v. Allen*, 250 S.C. 123, 156 S.E.2d 633 (S.C. 1967); *Pendleton v. City of Columbia*, 209 S.C. 394, 40 S.E.2d 499 (S.C. 1946); *Willis v. Town of Woodruff*, 200 S.C. 266, 20 S.E.2d 699 (S.C. 1942).

The South Carolina Supreme Court – in *Grimsley v. S. Carolina Law Enforcement Div.*, 396 S.C. 276, 721 S.E.2d 423 (S.C. 2012) – held that a law that guarantees a person a future payment creates a cognizable property interest in that payment. In *Grimsley*, a group of former South Carolina Law Enforcement Division ("SLED") employees sued SLED after they were re-hired and forced to sign a form stating that they "will have a reduction of 13.6% in [their] salary to cover the amount it will cost SLED to pay the employer portion of retirement." *Id*. at 279, 721

S.E.2d at 425. They claimed to have a property interest rooted in state law with respect to the percentage of their salary (13.6%) that was used to pay the employer portion of statutorily required retirement contributions. *Id.* at 284-85, 721 S.E.2d at 427-28. The South Carolina Supreme Court agreed based on the mandatory language employed by the applicable statute:

> An employer ***shall*** pay to the system the employer contribution for active members prescribed by law with respect to any retired member engaged to perform services for the employer, regardless of whether the retired member is a full-time or part-time employee or a temporary or permanent employee.

Id. at 284, 721 S.E.2d at 427 (quoting S.C. Code Ann. § 9-11-90(4)(b)) (quotation marks omitted, emphasis added by the court). Similarly, the BLRA states that:

> Where a plant is abandoned after a base load review order approving rate recovery has been issued, the capital costs and AFUDC related to the plant ***shall*** nonetheless be recoverable under this article provided that the utility shall bear the burden of proving by a preponderance of the evidence that the decision to abandon construction of the plant was prudent.

S.C. Code Ann. § 58-33-280(K) (emphasis added).

Over the last ten years, SCE&G has invested billions of dollars in construction efforts in reliance on the guarantees set forth in the BLRA. As a result of this reliance, SCE&G acquired vested rights pursuant to the terms of the BLRA as they existed in 2009, when the Base Load Review Order was issued. Indeed, in the utility ratemaking context, the United States Supreme Court has previously stated that "a State's decision to arbitrarily switch back and forth between methodologies in a way which required investors to bear the risk of bad investments . . . would raise serious constitutional questions." *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 315 (1989); *see also Verizon Commc'ns, Inc. v. Fed. Commc'ns Commission*, 535 U.S. 467, 527 (2002) (finding that "opportunistic changes in rate setting methodologies" give rise to violations

of the Takings Clause). Act 258 cannot properly be interpreted to apply retroactively without raising the possibility of serious constitutional challenges to the act.

Furthermore, interpreting Act 258 such that it does not apply retroactively avoids a serious risk of compromising SCE&G's financial integrity and thereby violating the constitutional standards enunciated in *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944) and *Bluefield Waterworks & Imp. Co. v. Pub. Serv. Comm'n of W. Va.*, 262 U.S. 679, 692–93 (1923) (citations omitted).[8]

For all these reasons, interpreting the prudency standards in Act 258 to apply retroactively would be unjustified under the rules of statutory construction which require potential constitutional conflicts to be avoided. Thus, the Commission should enter an order declaring that Act 258 cannot be applied retroactively for purposes of these Consolidated Dockets, and excluding all testimony, evidence, and argument regarding issues concerning the same.

CONCLUSION

Joint Applicants' filings in the Consolidated Dockets present a clear path forward for the Commission in the form of the Customer Benefits Plan, which SCE&G and Dominion Energy are proposing as an appropriate resolution of the regulatory issues related to the NND Project, and in support of the proposed business combination between the two companies. The relief sought in this Motion not only comports with well-established legal principles, but it will also provide a firm legal foundation for adoption of the Customer Benefits Plan.

[8] Together, the *Hope* and *Bluefield* cases provide "the basic principles of utility rate regulation" in South Carolina. *S. Bell Tel. & Tel. Co. v. Pub. Serv. Comm'n*, 270 S.C. 590, 595, 244 S.E.2d 278, 281 (1978), *holding modified by Parker v. S.C. Pub. Serv. Comm'n*, 280 S.C. 310, 313 S.E.2d 290 (1984); *Patton v. S.C. Pub. Serv. Comm'n*, 280 S.C. 288, 291, 312 S.E.2d 257, 259 (1984).

Thus, for the reasons set forth above, Joint Applicants respectfully request that the Commission issue an order declaring that:

1. The parties in the Consolidated Dockets cannot challenge or reopen any of the determinations that this Commission and the courts have made regarding the NND Project prior to SCE&G's decision to abandon the Project;
2. The retroactive application of the prudency standard in Act 258 is precluded; and
3. Otherwise upholding the legal principles discussed here.

Respectfully submitted,

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Cayce, South Carolina
October 19, 2018

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of **SCE&G'S MOTION FOR DECLARATORY RULINGS AND MOTION *IN LIMINE*** via electronic mail upon all counsel of record.

/s/Belton T. Zeigler
Belton T. Zeigler

Columbia, South Carolina
October 19, 2018